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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. ~~749~~ 46

J. H. McCORMICK,

Petitioner,

vs.

H. M. LEWIS AND A. M. LEWIS, SR.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

JOHN M. COE,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 749

J. H. McCORMICK,

vs.

H. M. LEWIS and A. M. LEWIS, SR.,

Respondents.

PETITION FOR WRIT OF CERTIORARI

Comes now the Petitioner and respectfully moves the Court to grant writ of certiorari to the United States Court of Appeals of the Fifth Circuit to review its decision adverse to the Petitioner in a certain cause therein pending numbered 14,060 wherein Petitioner was Appellant and Respondents above named were Appellee, and files herewith a certified transcript of the record in the said cause, including the proceedings in the said United States Court of Appeals of the Fifth Circuit: Opinions below are reported in Vol. 102 Fed. Supp. Page 624 and 201 Fed. 2d page 861.

Summary and Statement of Matter Involved

Petitioner instituted a civil action in the District Court of the United States for the Northern District of Florida,

against the Respondents to recover together, with damages, a binder deposit of $27,000.00 seized and forfeited by the Respondents for alleged failure upon the part of the Petitioner, (the purchaser of corporate stock) to pay the balance of the purchase price of $119,000.00 within the time limited by contract. (C. C. Record pp. 1-15). The trial court after hearing Plaintiff (Petitioner's) evidence, rendered judgment for the Defendants (Respondents) (C. C. Transcript pp. 122-128), because although Defendants had themselves first breached the contract, the Plaintiff had not promptly repudiated it, and declared for rescission, the trial court holding that the binder was forfeited as liquidated damages under the terms of the contract of sale, although no actual damages were proven.

Upon appeal to the U. S. Court of Appeals of the 5th Circuit, the said judgment was affirmed upon the same grounds.

Pending the hearing of the cause in the United States Court of Appeals, the Supreme Court of Florida, decided in the case of Paradis v. Second Avenue Used Car Co., 61 So. 2d. 919, that in the case of a contract calling for the forfeiture of a binder of $4,000.00 as liquidated damages for failure to complete a purchase of property under similar contract, it was necessary for the seller to plead and prove damages consequent upon such failure; and reversed a decision below, forfeiting said earnest money, consequent upon buyer's failure in an action for rescission of the contract, because no such damages were plead or proven.

This decision which was published January 22, 1953, just twenty-seven days before the decision of the Court of Appeals, was drawn to that court's attention by Motion for Rehearing filed on February 18, 1953, but that Court adhered to its prior decision and denied the motion for

rehearing on March 26, 1953; wherein it is respectfully submitted the said Court "decided an important question of local law in a way probably in conflict with applicable local decisions", within the purview of Rule 38 (5) (b) of this Court.

Jurisdictional Statement

The jurisdiction of this Court is founded upon Section 1254, Title 28, U. S. C. A.

The Question Presented

Where a contract for the purchase for $119,000.00 of the entire capital stock and release of an outstanding contract of a corporation organized to liquidate an abandoned military encampment theretofore bought from the Government, provided for the forfeiture, "as liquidated damages" of a binder or earnest money deposit of $27,000.00 dollars upon failure to buy within a time specified; and it is shown that the seller first breached the agreement, but the buyer did not promptly repudiate and seek rescission, is he thereafter when tardily seeking rescission bound to submit to the unilateral forfeiture of the earnest money by the seller, without pleading or proof that such seller suffered any damages through his failure to perform?

Reason for the Writ

(1) That the Circuit Court of Appeals has decided an important question of local law in a way in conflict with applicable local decisions.

(2) That the said Court has sanctioned a departure by the trial court from the accepted and usual course of judicial proceedings; i. e., it has held that one first breaching a contra can nevertheless hold the other party to full and perfect performance, under penalty of forfeiture,

and that without showing any damages suffered, or that damages if suffered were in any way commensurate with the sum forfeited.

SUPPORTING BRIEF

Statement of the Case

Appeal was taken herein to the United States Court of Appeals, Fifth Circuit, by the Plaintiff from a judgment of dismissal, rendered by the District Court at the close of Plaintiff's evidence, upon motion made by the Defendants under the provisions of subsection (b) of Rule of Civil Procedure No. 41 upon the ground that "upon the facts and the law the Plaintiff has shown no right to relief." (For convenience the parties will be designated as Plaintiff and Defendant.)

The action was brought by the prospective purchaser of the entire issue of corporate stock and a certain outstanding contract of a corporation known as Gordon Land Company, to set aside a forfeiture of $27,000.00 paid as a binder upon the purchase price thereof, which was appropriated by the sellers after being voluntarily delivered to them by the bank in which the same was deposited in escrow, upon the theory that the Plaintiff had defaulted in his duty to pay the balance of the agreed purchase price within the time limited.

The Plaintiff contended that the Defendants had themselves first breached the contract by fraud, and failure of compliance and by bleeding the corporation through conversion of its assets pending the sale and during the period that the deposit was in escrow, and the trial Court found that "the unexplained testimony on the record created a *prima facie* case of wrong doing by the Defendants" (Tr. p. 126).

The theory upon which the case was dismissed was that the Plaintiff did not immediately disaffirm the contract upon discovery of the fraud, from which the trial Court concluded not only that disaffirmance could not be had, but that the Defendants could still insist upon performance and forfeit the binder for non performance notwithstanding that they had not honestly performed themselves. From that judgment appeal was prosecuted.

The question for decision presented to the Circuit Court was as follows: Where the sellers of corporate stock during a necessary waiting period under an option to purchase are found by the buyer to have materially falsified the financial position of the corporation, and during such waiting period to have grossly depleted its assets by conveyance and conversion of real and personal property in violation of the specific terms of their contract; have purposely embarrassed and harassed the buyer by false notices of readiness to perform, and by denying him access to the corporate property of which he was under the contract the exclusive sales agent, can such defaulting sellers, who themselves committed and presently persist in breaches of their agreement, effectively forfeit buyer's binder deposit, without any proof of actual damage sustained, because he does not immediately give formal notice of intent to rescind, but merely fails and refuses to pay the contract price for the depleted stock offered to him?

Since the decision was on the merits at the close of the evidence a brief statement of the facts established follows:

The contract from which the action arose and which appears at pages 6 to 14 of the record, is a peculiar one. The Defendants were the owners of one-half of the capital stock of Gordon Land Company, a corporation, organized to buy and dispose of the surplus Government War Assets, consisting of the whole of the facilities of Camp Gordon

Johnson; the other half of the stock was held by a group known as the Ohio Stockholders, but Defendants undertook to sell to the Plaintiff all of the capital stock if they could procure it, and to procure the release of an outstanding corporate contract for the price of $119,000.00. No right was given if they failed so to do, to buy less than all of the stock, as in this event the Plaintiff merely took down his $27,000.00 and the transaction was at an end, without obligation upon the Defendants, but if stock and release of contract were delivered to the escrow agent within ninety days from the commencement of the escrow purchaser was to pay $92,000.00 more and take delivery thereof.

In order to secure the purchaser against depletion of corporate assets during the ninety-day period which was allowed to procure and deposit the stock and the release, and to make payment therefor, and to speed the liquidation of the corporate property which all parties desired, it was provided:

(1) That purchaser should within that period be the "exclusive sales agent of said Gordon Land Co.," making sales in his discretion, subject only to the written approval of H. M. Lewis, one of the sellers.

(2) That from the beginning of said 90 day period, all moneys received by Gordon Land Co., from sales and all other sources should be deposited in Apalachicola State Bank, subject only to the joint check of the buyer and H. M. Lewis, one of the sellers.

(3) That Gordon Land Co., had on deposit with Commercial Bank in Panama City, at the commencement of the period, approximately $8,500.00, from which during the escrow period it would pay "legitimate operating expenses," but that it would not either "declare or distribute any dividends of its profits, earnings or assets to any of the stockholders thereof."

The frauds and breaches of contract alleged by the Plaintiff and proven by the evidence (omitting those not fully proven) were as follows:

(1) That the Defendants represented that the balance owed to the War Assets Administration was $248,390.82, and that all payments were current, whereas in truth the corporation was in default upon said account in the sum of $81,675.82, and was consequently forbidden by the War Assets Administration to make any sales. See telegram of August 5, 1949, from L. D. Strom, Regional Director War Assets Administration (Tr. p. 136).

(2) That during the escrow period Defendants received on behalf of the corporation $52,500.00 as the proceeds of an insurance claim, but did not deposit the same in the joint account, but converted the same to other uses.

(3) That in order to prevent the performance of the contract and of his duties as sales agent, the Defendants forbade Plaintiff to come upon the premises of Camp Gordon Johnson, and hindered him in the performance of his duties. (See letter to Plaintiff from Defendant H. M. Lewis, Record pp. 141-143).

(4) To embarrass the Plaintiff in financing his purchase the Defendants twice falsely informed him that the capital stock was ready for delivery, and he twice came from Montgomery, Alabama, to Panama City, Florida, with $92,000.00 and found that the advice was untrue. See letter of McCormick to Lewis (Tr. p. 145), Lewis' telegram to McCormick (Tr. p. 146) "Put up or shut up;" also pp. 32, 65, 132, 133 and 147).

(5) That the Defendant by theatrical gun play tried to (and to a considerable extent did) frighten off the witness Dunbar who was financing Plaintiff's purchase. See Dunbar's testimony (Tr. p. 26).

(6) That the Defendants accumulated approximately $24,000.00 of the corporation's money in Commercial National Bank, at Panama City, during the escrow period, in violation of their agreement to deposit in joint account, and the day before delivery of stock was finally offered cut a melon of approximately $20,000.00 therefrom by distribution amongst themselves and their associates. Testimony of E. A. Gardiner (Tr. pp. 114-120).

(7) That the Defendants during the escrow period caused to be recorded back dated deeds conveying to themselves and their associates valuable waterfront property in Camp Gordon Johnston, including the commanding officer's house, another considerable house, three small dwellings and a large office building, worth in the aggregate thirty or forty thousand dollars (Tr. pp. 12, 71-78).

The items above numbered 1 to 5 inclusive, became currently known to the Plaintiff as they occurred; the cutting of the $20,000.00 melon was not discovered until after the institution of this suit; the back dated deeds were discovered about the end of the ninety day escrow period, and when nine (9) days prior to the termination thereof the Ohio Stockholders' stock was finally deposited, Plaintiff declined to accept it and pay the balance of $92,000.00, whereupon the Defendants seized and forfeited his deposit of $27,000.00, for the return of which and for $17,760.69 spent in attempted performance he brought this suit.

Findings of the Trial Court

The wrong doings above alleged are abundantly established by the evidence, but presently for the sake of brevity we quote from certain of the trial Court's findings indicating that it regarded them as proven (Tr. pp. 121-2):

> "Let me say this, the record in this case is to some extent like the record in the other case that the Court

had involving the transaction with reference to the sale of the Gordon Land Company, in which testimony of the plaintiffs made it appear that the defendants made it very difficult, if not almost impossible for the man who had the option to go through with his transaction."

and again in Tr. p. 126:

"Plaintiff offered considerable testimony in support of these allegations during the trial of the case and while all the allegations were not satisfactorily sustained by the evidence, the unexplained testimony on the record created a prima facie case of wrong doing by Defendants."

The trial Court based its decision adverse to the Plaintiff upon an assumed continued willingness of Plaintiff to perform after the discovery of the frauds recited (Tr. pp. 122 and 126).

Reason for Writ No. 1

(1) That the Circuit Court of Appeals has decided an important question of local law in a way in conflict with applicable local decisions.

The local law as set forth by Supreme Court of Florida, most clearly in the case of *Paradis et ux.* v. *Second Avenue Used Car,* 61 So. 2d 919, where the court dealt with a contract for the sale of real estate which provided that the purchase should be completed and the price paid within thirty (30) days after delivery or tender of abstract:

"Otherwise the sum this day paid" (to-wit: $4,000.00) "shall be retained by the seller as liquidated and agreed damages and the seller shall be relieved from all obligations under this instrument."

In the case at bar the Court was dealing with a contract for the sale of corporate stock, representing the value of Camp Gordon Johnson, real estate and the buildings and

facilities thereon; which contract provided that unless the balance of $92,000.00 were paid within the time specified, all sums of money whether retained by the Defendants or disbursed to their associates:

> "Shall by said parties be kept, held and retained as stipulated and liquidated damages and as reasonable compensation for the performance and forbearance provided herein" (Tr. p. 13).

In the cited case the Supreme Court of Florida stated the question for decision, as follows:

> "The only point for determination is whether or not, under the facts stated, the vendors were entitled to retain the earnest money paid on the contract as liquidated damages."

This was the principal (although not the only point, presented to the trial court and to the Court of Appeals in the case at bar. In deciding this point in the cited case, the Supreme Court of Florida said:

> "The burden was on appellants to plead and prove the damages suffered for breach of the contract. They did not do this. In fact it was not claimed that they suffered damages. They rely on the bald statement in the contract that the sum paid shall be retained as liquidated damages. They show no damages, no equity in their favor, or no conditions that would justify them holding the sum paid on the contract. The chancellor was correct in ordering the return of the money so paid, but he was in error in requiring the return of the money so paid, but he was in error in requiring that appellants pay legal interest on it from the date of the contract."

In the case at bar, the defendants plead no damages, they introduced no evidence of damages, or for that matter of anything else, they just sat still and let the windfall drop into

their pockets through the refusal of the court below, and the appellate court to grant any aid when a litigant sought relief.

In the case of *Pembroke* v. *Caudill*, 37 So. 2d 538, cited in the above case the Supreme Court of Florida said in substance that in dealing with stipulations for the forfeiture of money denominated "liquidated damages", the court must enquire whether the parties have had in view the principle of "just compensation", in case of uncertainty of damages, or whether a penalty has been provided "in terrorem". This is not new law, but it is a reenunciation of an old principle, and it is indicated that it is a judicial duty to enquire and determine into which category the forfeiture falls; in the case at bar the court wholly refused to do this judicial duty, required no proof nor even pleading, listened to no evidence of damages, required none, but simply swept away Plaintiff's claim as though the contract were Holy Writ.

Reason for Writ No. 2

(2) That the court below has sanctioned a departure by the trial court from the accepted and usual course of judicial proceedings; *i. e.*, it has held that one first breaching a contract can nevertheless hold the other party to full and perfect performance, under penalty of forfeiture, and that without showing any damages were suffered, or that damages if suffered were in any way commensurate with the sum forfeited.

It is elementary that one who is himself in default for the non performance of a material part of a contract, cannot require performance of the other party; see Restatement, Contracts, Section 397, as follows:

> "A breach or non-performance of a promise by one party to a bilateral contract, so material as to justify a refusal of the other party to perform a contractual duty, discharges that duty."

The sellers of the capital stock in question agreed to deposit all new funds in joint account, and not to dissipate the money; they failed so to deposit $52,500.00, but converted it to other uses never fully disclosed.

Omitting all other items, we respectfully inquire whether the purchaser of the capital stock, could justly be required to deposit $92,000.00 as the balance of the purchase price thereof, when the sellers in violation of their contractual duty, had filched well upwards of $50,000.00 of real and personal property from the corporate assets.

The reason why a party so situate as the Plaintiff is not compelled to accept depleted assets at full contract price, is well set up in the Restatement, Contract, Section 274:

> "In promises for an agreed exchange, any material failure of performance by one party not justified by the conduct of the other discharges the latter's duty to give the agreed exchange even though his promise is not in terms conditional * * *"

and in the comment thereunder the reason is given as follows:

> "The reason for the rules in this and the following section of this topic, is failure of consideration. Failure of consideration is a generic expression covering every case where an exchange of values is to be made and the exchange does not take place, either because of the fault of a party or without his fault. *In any such case a party who has not himself caused the failure of consideration by a breach of duty, may refrain from giving any part of the exchange which he has not yet given, and generally may reclaim what he has given, or its value*". (Emphasis ours.)

Therefore, when a seller tenders delivery of a thing whose value he has himself depleted, the purchaser does not get

that for which he bargained, and he not only is not bound to pay the balance of the price, but may recoup his deposit.

Yet the trial Court said that he could not have this, because he did not promptly demand it.

Lastly, it is an elementary principle of the law of Florida, as of all enlightened contract law, that as stated in the case of *Alachua Phosphate Co.* v. *Anglo Continental Guano Works,* 51 Fla. 143, 40 So. 71. "If the plaintiff violated the contract, the defendant cannot be held to its performance."

We respectfully inquire by what right or title Defendants could become the owners of Plaintiff's $27,000.00, except thorough the enforcement of the highly penal forfeiture provisions of the contract which they themselves had first breached. Certainly if they had sued on the contract, Plaintiff could have defended by showing their wrong doing; they were however in the happy position that they did not have to take affirmative action; they merely took possession of Plaintiff's money without application to any court; yet the trial Court seemed to feel that some peculiar burden rested upon the Plaintiff because he had to take affirmative action, and that he was remediless unless he strictly conformed to the technical niceties of the doctrine of rescission in equity. We respectfully submit that here was a civil action; that the Plaintiff, from traditional habits of mind, conceived it as a bill in equity to rescind a contract, and to set aside and recover a forfeiture; his evidence disclosed a situation where he had parted with a very substantial sum of money, in exchange for return performance, which not only was not rendered to him, but honest efforts to perform upon his part were viciously sabotaged; then with no opportunity to get what he bargained for, his money was taken from him by extrajudicial action, because he was unwilling to feed $92,000.00 into the rat hole to follow the $27,000.00 he had

initially put in, and the Court says: "True he was wronged, but he has misconceived his remedy, therefore he forfeits his rights."

Conclusion

It is respectfully submitted that the writ should be granted, for if this decision stands one who has unrighteously taken a profitable forfeiture to compensate for a trivial or non-existent damage, only has to go into Federal Court, to escape the just ruling of the Supreme Court of Florida; and neither Federal Courts nor others should be a refuge for those who have defrauded their fellow citizens.

Respectfully submitted,

JOHN M. COE,
Counsel for Petitioner.

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Supreme Court of the United States

OCTOBER TERM, 1952.

No. [redacted]46

J. H. McCORMICK,
Petitioner,

versus

H. M. LEWIS AND A. M. LEWIS, SR.,
Respondents.

BRIEF ON BEHALF OF RESPONDENTS.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1952.

No. 749.

J. H. McCORMICK,

Petitioner,

versus

H. M. LEWIS AND A. M. LEWIS, SR.,

Respondents.

BRIEF ON BEHALF OF RESPONDENTS.

JURISDICTIONAL STATEMENT.

Jurisdiction of this Court was invoked by Petitioner under Section 1254, Title 28, U. S. C. A.

STATEMENT OF THE CASE.

The petitioner sued in the District Court for rescission because of alleged frauds of his contract with the respondents for the purchase of their 600 shares (out

of a total of 1200 shares outstanding, the other 600 shares being owned by northern stockholders) of the common stock of Gordon Land Company. The petitioner, in consequence of the alleged frauds, also sought the recovery of a down payment and reimbursement for alleged expenses in "attempted performance" of the contract on his part.

The agreement in suit (R. 6-13) recites that the petitioner had contracted with each of the four northern stockholders for their shares of stock (150 shares each or a total of 600 shares) and with the two respondents for the 300 shares of stock owned by each of them, and that the total price for all 1200 shares was $104,000.00 (R. 6). The four northern stockholders (owning a total of 600 shares) were not parties to the contract in suit and were not joined as defendants.

Under the escrow agreement, the respondents on August 1, 1949, deposited their 600 shares of stock and petitioner deposited $12,000.00 with the escrow agent (Commercial Bank in Panama City, Florida). The escrow agent was to hold the 600 shares of stock and the $12,000.00 for a period not to exceed ninety days from August 11, 1949, and if during that period the northern stockholders (who, as already noted, were not parties to the escrow agreement or this suit) should deposit their 600 shares of stock and the petitioner should deposit an additional sum of $92,000.00, then all of the stock was to be delivered to petitioner and the $104,000.00 was to be distributed among all the stockholders in proportion to their stock ownership. The contract

further provided that in event of nonperformance by petitioner the respondents should receive back their 600 shares of stock deposited with the escrow agent and also the down payment of $12,000.00 as "liquidated damages and as reasonable compensation for the performance and forbearance provided herein". (R. 13.)

Gordon Land Company joined in the escrow agreement for the reason that it had outstanding agency contracts with Nathan Boniske and Abe Fletcher, doing business as Southeastern Distributors, which for petitioner's purposes it would be necessary to eliminate if petitioner completed his purchase. As between petitioner and Gordon Land Company, the escrow agreement provided that petitioner would deposit an additional $15,000.00 "for the express and exclusive purpose of paying the said Abe Fletcher and Nathan Boniske in full for the release" of said agreements (R. 9). The escrow agent was directed to pay this $15,000.00 to Abe Fletcher and Nathan Boniske as soon as the remaining 600 shares of stock (owned by the northern stockholders) were deposited with the escrow agent, provided releases by Fletcher and Boniske had also been deposited with the escrow agent (R. 9).

Another reason for the joinder in the escrow agreement by Gordon Land Company was the provision therein that petitioner would become the exclusive sales agent of the company after his deposit of the binder of $12,000.00 and $15,000.00 for the cancellation of the prior agency agreement with Fletcher and Boniske (R. 10). Also, Gordon Land Company joined to give effect

to a provision in the agreement as to the bank accounts of the company (R. 11).

It should be noted, however, that petitioner did not join Gordon Land Company as a party defendant. Only the respondents, two individuals owning together half of the outstanding stock of this company, were sued by petitioner.

All of the 1200 shares of stock were in the hands of the escrow agent by November 1, 1949 (R. 90). The $15,000.00 was paid to Fletcher and Boniske (who also were not joined as defendants) in exchange for their releases of Gordon Land Company from its contractual obligations with them, and the respondents became entitled to the $12,000.00 binder deposit on account of the purchase of their 600 shares of stock. The petitioner was duly notified by the escrow agent of the availability of all the stock. He was unable to raise the $92,000.00 by November 9, 1949, the expiration date for the escrow period, but was granted a 30-day extension. He was still unable to perform so at the end of the extension the escrow agent returned the stock to the various owners and terminated the agreement.

In his complaint (R. 1-5) the petitioner charged the respondents (and the corporation which is not joined as a defendant) with numerous frauds and misrepresentations, some of which he abandoned at the trial for want of any proof whatever. As to the remaining charges, it is the position of the respondents that such "proof" as was submitted amounted to no more than groundless suspicions, that no fraud or misrepresenta-

tion whatever has been established by the proof and none in fact exists. However, as is pointed out by the District Court in its findings, it is actually unnecessary to consider whether any charges of misrepresentation and fraud are well founded for the reason that the petitioner had acquired or was chargeable with knowledge as to the facts on which his charges are based and "not only took no steps to cancel the option, but, on the other hand, sought and secured a 30-day extension thereof and during all the times from November 1, 1949, until the option with the extension expired he endeavored to consummate the transaction" (R. 126).

The District Court further summarized the sound reason for its ruling in the following language:

> "But despite all of those things he has said about the defendants and about their efforts to rook him and break this deal, the fact is according to his own testimony, is that on a date after all these things had happened, he was still ready and anxious and willing to go through with his option and the only reason he didn't do it was his inability to finance it. Under proof of that character, in a case of this kind, there is nothing for the Court to do but grant this motion and accordingly the motion of the defendants for a judgment in favor of the defendants is granted, and this case will be dismissed. (R. 122.)"

The whole theory of the petitioner's case in the District Court (as evidenced by the complaint—R. 1-5) and in the Court of Appeals (see opinion reported at 201 Fed. 2d 861) was that he was entitled to rescind

his agreement and recover his binder deposit and disbursements because of alleged fraud on the part of the respondents. After both of these Courts had decided against him on this theory he moved for a rehearing in the Court of Appeals on the entirely different theory that, conceding *arguendo* he was not entitled to a rescission for fraud, he should nevertheless recover his binder as an unconscionable forfeiture, absent proof of actual damages by the respondents. (See Page 2 of petition for certiorari.)

ARGUMENT.

Petitioner's "Reason for Writ No. 1".

Petitioner contends that the Court of Appeals has done violence to Florida local law as announced in *Paradis et ux. v. Second Avenue Used Car,* 61 So. 2d 919. In that case a purchaser of real estate sued to rescind the purchase agreement and to recover a substantial binder deposit, and under the circumstances of that particular case the refund was required. The case at bar is easily distingushed.

In the first place, here the contention that the contract provision for liquidated damages amounted to an inequitable forfeiture was first advanced by the petitioner on motion for rehearing in the Court of Appeals, and therefore came too late to be considered. The fact is that petitioner has alternately claimed recovery of three different amounts, shifting from one to another

as he seemed to regard most opportune at the moment. In the District Court he sued to recover a total of $44,760.69, consisting of the down payment of $12,000.00 received by the respondents under the escrow agreement, the $15,000.00 received by the former sales agents of Gordon Land Company in accordance with the agreement, and $17,760.69 allegedly spent by him in "attempted performance" of the purchase agreement (R. 1-5, 14, 15). After the Court of Appeals affirmed the denial of any of this attempted recovery, he moved for a rehearing and reduced his claim to the $12,000.00 received by the respondents, admitting that "$15,000.00 of the binder money had been paid to third persons and appellant concedes that upon this theory (his new theory of inequitable forfeiture) it was not recoverable." Now in this Court petitioner is contending for $27,000.00, without suggesting any reason why the respondents under any theory would be liable for the $15,000.00 paid to third parties.

Secondly, we submit that petitioner has misconstrued the Florida Supreme Court's opinion in the *Paradis* case, *supra*. It was not held that in every case a contract provision for liquidated damages requires proof of actual damages to sustain it;

> "* * * but that it is a question of law to be determined by the court, depending on the terms of the instrument, its real character, the circumstances surrounding its execution and the conditions attending its breach."

The *Paradis* case, *supra*, involved a contract for the sale of real estate where the actual damages upon breach were easily susceptible of ascertainment. Here we are

concerned with the sale of stock in a corporation which petitioner himself admits was highly speculative in nature. The agreement committed the stock of the respondents into the hands of an escrow agent for over 90 days. It required the corporation to cancel certain agency agreements with third parties and to make the petitioner its exclusive sales representative during the escrow period, and it tied up the funds of the corporation. In recognition of these provisions the parties agreed that if petitioner should fail to complete the purchase the amounts paid to the erstwhile sales agents and to the respondents

> "shall by said parties be kept, held and retained as stipulated and liquidated damages and as reasonable compensation for the performance and forbearance provided herein." (R. 13.)

The *Paradis* case recognized as controlling authority the somewhat earlier case of *Pembroke v. Caudill,* 37 So. 2nd 538, 6 A. L. R. 2d 1395, where it is said:

> "Where the actual damages contemplated when the contract was made are in their nature uncertain and may so depend upon extrinsic considerations and circumstances as to be incapable of ascertainment with any reasonable degree of exactness, and the fixed sum stipulated to be paid is not disproportionate to the probable injury likely to result from a breach of the contract, effect should be given to the stipulation as one for liquidated damages, without regard to its designation or the amount of injury actually suffered as the result of the breach. Southern Menhaden Co. v. How, 71 Fla. 128, 70 So. 1000."

In the most recent Florida case to be reported the Court sustained a motion to dismiss a complaint seeking the recovery of a security deposit, *North Beach Investments v. Sheikewitz, 63 So. 2d 498.* Of course, no testimony whatever was before the Court, and it was held:

> "* * * when the actual damages cannot be susceptible of ascertainment by some known rule or pecuniary standard under reasonable circumstances, the stipulated amount should be regarded as liquidated damages, and the parties should be bound by their covenants and the contract so made."

Petitioner's "Reason for Writ No. 2".

Petitioner argues secondly that the court below "has held that one first breaching a contract can nevertheless hold the other party to full and perfect performance, under penalty of forfeiture." If the petitioner is reopening the issue of whether he with knowledge waived any alleged breaches by the respondents then he is taking a position quite inconsistent with his "Reason No. 1".

Moreover, this "reason" is itself fraught with error when it suggests that the court below is holding the petitioner "to full and perfect performance" as if sued by the respondents (defendants below). The respondents do not seek any relief or performance at all of petitioner. The citations of petitioner in support of this "reason" show how clearly he has misconceived the situation and relies on authorities wholly inapplicable in a suit to *rescind* a contract. The quotations from the

Restatement of the Law of Contracts all deal with a situation in which the party who claimed to have been defrauded was the *defendant* and asserted in defense of and action for *performance* charges of fraud *on the part of the plaintiff*. The authorities cited, and this "reason", could be applicable only had the respondents sued the petitioner for the payment of the balance of $92,000.00, in other words a suit for performance in which the parties plaintiff are charged with fraud.

This "reason" continues to assume that the respondents are chargeable with "breaches and frauds" although both of the lower courts have held that their breaches, if any, have been waived by the petitioner.

Not only is petitioner bound by the fact that with knowledge of the alleged fraud he did not repudiate the contract and instead continued in affirmance of it, but also he delayed more than a year and a half after the expiration of the extension of the option period, without any explanation, before he instituted this suit. This contract, of course, dealt with a highly speculative proposition and delay could be very prejudicial to the defendants. The opinions of the District Court and the Court of Appeals both are firmly grounded on two Florida cases cited in them. The Florida Supreme Court in the case of *Peacock Hotel vs. Shipman*, 103 Fla. 633, 138 So. 44, 46, where there was a delay of 17 months in bringing suit, said:

> "One possessing the right to rescind a transaction on the ground of fraud, misrepresentation, mistake, or other sufficient cause and desiring to exercise

such right, must not be guilty of any unreasonable or unnecessary delay in the assertion of his purpose and in taking steps to make it effective, or he will be denied relief in equity on the ground that such delay is tantamount to a waiver of his objections to the transaction. Mizell v. Watson, 57 Fla. 111, 49 So. 149; Hirschman v. Hodges, 59 Fla. 517, 51 So. 550. See, also, Ansley v. Bank of Piedmont, 113 Ala. 467, 21 So. 59, 59 Am. St. Rep. 122.

"In the case at bar the purchaser went into possession of the property on May 17, 1929. The answer asking for the rescission and cancellation of the purchase contract was not filed until October 15, 1930, with no excuse whatsoever being offered for the delay."

Again, in the case of *Farnham vs. Blount*, 152 Fla. 208, 11 So. 2d 785, 788, the Florida Supreme Court said:

"The power of avoidance for fraud or misrepresentation is lost if the injured party after acquiring knowledge of the fraud or misrepresentation manifest to the other party to the transaction an intention to affirm it, the injured party must assert his remedial rights with diligence and without delay upon becoming aware of the fraud. After he obtains knowledge of the fraud or has been informed of facts and circumstances from which such knowledge would be imputed to him, a delay in instituting judicial proceedings for relief, generally, will be regarded as a bar to equitable relief."

And lest there be any assumption that the respondents by silence admit any of the unfounded charges of fraud, we are constrained to consider briefly each of the

seven "frauds and breaches" set forth on pages 7 and 8 of petitioner's brief. The petitioner admits on page 7 that he had knowledge of the facts as to all except the 6th of his charges before the expiration of the original escrow period.

We believe the record not only fully supports the District Court's finding that he waived these charges by his continued efforts to perform (R. 122, 126), but also that the facts do not sustain the charges of fraud and misrepresentation which the petitioner has so recklessly made. We will examine these charges more closely:

> (1) Petitioner charges the respondents with misrepresenting that Gordon Land Company was not in default on its indebtedness to the War Assets Administration.

This charge is based on the telegram dated August 5, 1949, from War Assets Administration (R. 40, 136). It mentions the quarterly installment due August 1, 1949, which, of course, was not delinquent when the agreement was signed on July 28, 1949. It also claims a shortage because of the alleged removal of some buildings and improvements without authorization. There is no proof that an actual shortage existed. In any event, whatever amounts were due War Assets Administration were paid within a few days pursuant to a stipulation the plaintiff himself signed (R. 42, 137), and the amounts so paid resulted in a substantial reduction of the admitted balance of $248,690.82 owed to War Assets Administration (R. 46-47).

(2) Respondents are charged with misuse of $52,500.00 of insurance proceeds.

(6) Respondents are further charged with a deposit of $24,000.00 in Commercial National Bank at Panama City, in violation of an agreement to deposit in a joint account in another bank, and as alleged improper distribution of approximately $20,000.00 therefrom among the respondents and their associates.

We treat these two charges together for the reason that admissions of counsel for the parties before the Court (not recorded in the transcript) established that the deposit of $22,400.00 on October 21, 1949, (R. 115) in the Panama City Bank was a portion of the insurance proceeds. The petitioner charges generally that the respondents converted $52,500.00 in insurance proceeds to other than corporate uses and duplicates this with his charge that the two respondents participated in a "melon cutting" of approximately $20,000.00 (from funds which were admittedly a part of the insurance proceeds).

Like the charges of the plaintiff in the case of *Brensinger vs. Margaret Ann Super Markets,* 192 F. 2d. 458, (5th Circuit, 1951), petitioner's charges and his evidence to sustain them fail to show "wherein the acts charged to (the respondents) were wrongful or illegal, relying instead on mere generalities and conclusions." Out of the so-called "melon cutting" of $20,000.00 the respondent H. M. Lewis is shown to have received only $1,230.00 and the respondent A. M. Lewis, Sr., but $49.70 (R. 117 and see petitioner's original Ex. No. 34, not included in transcript). All of the rest of the disbursements went to persons who are not parties to this suit.

There is no effort whatever to show that these comparatively small disbursements to the respondents, or any of the other disbursements for that matter, were for an improper purpose. Notwithstanding the heavy burden on the petitioner to prove his charge of fraud, he relies merely on insinuations and innuendo and asks the Court to conclude that he was defrauded by these disbursements.

Further, the insurance proceeds belonged to Gordon Land Company, not these defendants, and any disbursement or other use of the proceeds was by and for the corporation which, though a party to the agreement, is not joined as a party defendant.

In addition, it clearly appears from the record that the respondent was sufficiently advised of the pending insurance claim, its settlement at $52,500.00 and the collection of the proceeds, to be charged with full knowledge of the facts upon which he now relies, before the expiration of the escrow period and its extension, notwithstanding which he continued in his efforts to finance and consummate the agreement he here seeks to rescind. (R. 85-86.)

(3) It is charged that the respondents hindered the petitioner in his performance of the contract by forbidding him to come upon the premises at Camp Gordon Johnston.

It is true that the respondent H. M. Lewis, as vice-president of the Gordon Land Company, wrote the petitioner a letter dated September 14, 1949, forbidding him

to come upon Camp Gordon Johnston, in view of enumerated deviations from the escrow agreement by the petitioner. (R. 53, 141-143.) However, the prohibition was not observed by the petitioner or his son who was actually living at Camp Gordon Johnston as petitioner's representative (R. 56). Further, this letter was dated September 14, 1949, and notwithstanding its receipt the petitioner continued his efforts to finance and complete the purchase throughout the remaining period of the escrow agreement ending November 9, 1949, and the thirty-day extension which he obtained from the respondents.

> (4) Petitioner charges that the respondents twice falsely informed him that all of the capital stock was ready for delivery, in order to embarrass him in his financing.

Petitioner is in error in implying that the respondents had contracted to sell appellant *all* of the capital stock of Gordon Land Company and that these respondents were to deposit *all* of the stock with the escrow agent within ninety days. The agreement itself recites in the second "Whereas" clause (R. 6) that the petitioner had contracted with *each stockholder* with respect to his stock and the four northern stockholders (owning 150 shares each) are specifically listed by name. There was no obligation or undertaking whatever on the part of the respondents to procure the delivery of the 600 shares owned by the northern stockholders. The escrow agreement was only a vehicle by which petitioner could acquire the 600 shares owned by the respondents if he at the same time independently completed the purchase

of the 600 shares owned by the four northern stockholders. The respondents delivered their 600 shares of stock to the escrow agent on August 1, 1949, in accordance with the escrow agreement, which was the same date that petitioner deposited his binder of $12,000.00 and the sum of $15,000.00 to enable Gordon Land Company to buy up its agency contract with Fletcher and Boniske (R. 28).

Even if petitioner's uncorroborated testimony that defendants made false *oral* representations as to the availability of the northern stock is to be believed, there is no showing as to how he was harmed. Moreover, he was not entitled to rely on any such representation, because the escrow agreement provided for the 600 shares owned by the northern stockholders to be delivered to the escrow agent itself who would then give registered mail notice to petitioner (R. 7). Indeed, petitioner himself realized that he should have looked to the escrow agent for notification, and he admits that the northern stockholders had indicated that the stock would not be delivered and were in fact trying to get a higher price from him. (R. 98.)

(5) The respondent H. M. Lewis is charged with resort to theatrical gun play to scare off a prospective financier for the petitioner.

This gun play incident is alleged to have occurred on September 16 (R. 25-26, 71). It is said to have consisted of threats against the petitioner in his absence but when the petitioner arrived shortly thereafter no effort was made to carry out the alleged threats. The finan-

cier, E. F. Dunbar, certainly could not have been very scared for only five days later he wrote his letter of September 21 (R. 29, 135) asking the petitioner to "let me know when we expect to go down there again," and continuing his offer to advance the $92,000.00. And, of course, this gun play incident occurred on September 16 and the petitioner without disaffirmance, continued his efforts on through November and into December to complete the purchase of the stock.

> (7) The final charge is that these respondents during the escrow period "caused to be recorded back-dated deeds conveying to them and their associates" allegedly valuable portions of the Camp Gordon Johnston property.

There is no basis, except petitioner's insinuation, that the deeds were back dated, nor is there any evidence that the respondents caused the deeds to be recorded. The trial Court appropriately remarked regarding the efforts of the petitioner to show substantial value for the property described in these conveyances, "That is pretty visionary" (R. 83).

In any event the petitioner said that he was informed of these deeds about November 1 (R. 73), and also was advised that this property would be conveyed back to the corporation (R. 87). Thus he had knowledge of these conveyances before the end of the original escrow period. Also, he testified as to his efforts to obtain financing through H. C. Long & Associates during the 30-day extension of the escrow period and introduced in evidence a letter to these financiers signed by the

respondent H. M. Lewis for Gordon Land Company, dated November 23, assuring them that the property would be reconveyed to the corporation (R. 84, 151-153). So, as to this as well as all the other charges of fraud and misrepresentation, petitioner was fully informed but did not elect to repudiate the contract and instead continued his efforts to finance it and even obtained an extension of time within which to complete his arrangements.

Petitioner's brief concludes with the complaint on pages 13 and 14 that he has been made the victim of "the technical niceties of the doctrine of rescission in equity" and that the lower courts have said that he was wronged but "he has misconceived his remedy, therefore he forfeits his rights." Apparently he is arguing that if he has lost the right to any recovery in an action to rescind (by reason of his continued affirmance of the agreement after knowledge of the alleged breaches and by reason of his delay in bringing suit), then the Court should lend a helping hand and award him full damages not from all of the parties benefited by the agreement but from only the two against whom he has elected to assert his unsuccessful claim for a rescission.

However, our modern and liberal rules of procedure after all relate only to procedural matters and not to an election between inconsistent substantive rights. The complaint, drafted in clear language by astute Counsel, concludes with the specific prayer:

> "Wherefore the Plaintiff files this his complaint in the nature of a bill in equity for rescission of

said contract and avoidance of said forfeiture * *" (R. 5).

The authorities already cited make it clear that one who affirms an agreement by continued attempted performance, or who vacillates between affirmance and disaffirmance, will not be permitted thereafter to elect to rescind. The Restatement of the Law of Contracts (Sec. 484, Page 926) states a clear illustration which completely answers petitioner's naive suggestion that the rules of procedure should permit him to reverse his stand.

> "A fraudulently induces B to enter into a contract. On discovery of the fraud B brings an action of tort for deceit against A. Subsequently B discontinues the action and informs A of an intent to avoid the transaction. Even if the notification would have been seasonable and effective had the action of deceit not been brought, the bringing of the action is a manifestation of intent to affirm the transaction and precludes avoidance thereafter. If B had brought an action on the contract, this also would preclude avoidance. *B is here exercising an election between inconsistent substantive rights and not merely between inconsistent procedural remedies.*"

The rule is stated in American Jurisprudence as follows:

> "There is an inconsistency between a suit in equity to rescind and cancel a contract for fraud or other cause and an action at law to recover damages. The former necessarily affirms that the contract does not exist at the time the suit is brought,

and never did exist, and is inconsistent with the action for damages, since the latter necessarily assumes that the contract does exist. It is fundamental that a party cannot pursue both the remedy by rescission and affirmance. The difference between the two suits is substantial and not merely nominal. When a party rescinds a contract, the law does not permit him thereafter to make use of it as subsisting for the purpose of suing for damages." 18 Am. Jur. 152.

CONCLUSION.

We respectfully submit that the petition for certiorari should be denied because:

(1) The decision of the Court of Appeals is entirely in harmony with local law in Florida where the Courts recognize and give effect to stipulations in agreements as to damages upon breach where, as here, actual damages would be difficult of ascertainment.

(2) The Court of Appeals has not departed from the accepted and usual course of judicial proceedings and has not, as contended, held the petitioner to performance under penalty of forfeiture. The lower Courts have simply denied petitioner the right to rescind his purchase agreement for alleged breaches by the respondents which he with full knowledge completely waived by continued recognition, attempted performance and a requested extension, especially since he delayed unduly in suing to rescind.

(3) In any event, the petitioner's claim for a refund of his down payment (which respondents under the agreement are entitled to retain as stipulated damages) on the sole ground that the amount thereof substantially exceeds any actual damages comes too late when it is first asserted in a motion for rehearing in the Court of Appeals.

Respectfully submitted,

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Pensacola, Florida,
Counsel for Respondents.

CERTIFICATE.

This is to certify that copies of this Brief have been served on opposing counsel on this ..... day of June, 1953.

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